TAN HUN CHONG v. PP & ANOTHER CASE

HIGH COURT MALAYA, PULAU PINANG
AHMAD SHAHRIR MOHD SALLEH JC
[CRIMINAL APPEALS NO: 41S-14-11-2016 & 41H-57-11-2016]
5 JANUARY 2018

CRIMINAL LAW: *Control of Supplies Act 1961 – Section 21 – Accused charged for possession of unlicensed controlled article in circumstances that raised reasonable suspicion that offence was intended to be committed – Discovery of 2,231L diesel in additional tank of lorry – Accused not at scene where and when raid took place – Whether lorry belonged to accused – Whether accused had control over lorry and diesel – Accused convicted and sentenced with fine of RM30,000, in default 12 months imprisonment – Whether prima facie case established*

CRIMINAL LAW: *Control of Supplies Act 1961 – Section 20 – Accused charged at Magistrate's Court for permitting controlled article to be stored at premise not licensed or approved by Controller – Alternative charge – 2,231L diesel found in additional tank of lorry – Accused not at scene where and when raid took place – Magistrate did not make any ruling on alternative charge – Whether prosecution successfully established prima facie case against accused*

CRIMINAL PROCEDURE: *Appeal – Appeal against decision of Magistrate's Court – Appeal by accused against sentence and conviction – Accused convicted for offence under s. 21 of Control of Supplies Act 1961 and sentenced with fine of RM30,000, in default 12 months imprisonment – 2,231L diesel found in additional tank of lorry – Accused not at scene where and when raid took place – Whether prima facie case established – Whether lorry belonged to accused – Whether accused had control over lorry and diesel – Whether conviction and sentence safe*

CRIMINAL PROCEDURE: *Appeal – Appeal by prosecution – Appeal against decision of Magistrate's Court – Accused convicted for offence under s. 21 of Control of Supplies Act 1961 – Possession of unlicensed controlled article in circumstances that raised reasonable suspicion that offence was intended to be committed – Discovery of 2,231L diesel in additional tank of lorry – Accused convicted and sentenced with fine of RM30,000, in default 12 months imprisonment – Appeal against sentence*

The accused was charged at the Magistrate's Court with two offences under the Control of Supplies Act 1961 ('the Act'), namely (i) s. 21 for having in his possession without a license, 2,231L of diesel, a controlled article, in circumstances that raised a reasonable suspicion that an offence against the Act was intended to be committed ('the main charge'); and (ii) s. 20(1) for permitting 2,231L of diesel, which was stored in the lorry, at a premise which was not licensed or approved by the Controller ('the alternative charge'). The prosecution's case revealed that during a raid by the

Enforcement Division of the Ministry of Trade, Co-operatives and Consumerism, 2,231L of diesel were discovered in an additional tank at the rear of a lorry ('the lorry'). The accused was not at the scene when the raid took place but he was traced through the investigation by the investigating officer ('PW7'). In her investigation, PW7 carried out searches at (i) the Road Transport Department ('the RTD') and discovered that the lorry belonged to Sin Eng Aun Mobile Crane Sdn Bhd ('the company'); (ii) the Companies Commission of Malaysia and found that the company had two directors, namely PW3 and PW6, who alleged that they sold the lorry to the accused by way of a letter of agreement ('exh. P7') for RM20,000; (iii) Tenaga Nasional Berhad and discovered that the house ('the premise') where the lorry was found belonged to the accused's mother; and (iv) the National Registration Department ('the NRD') and discovered that the accused's address was the same as the premise. Satisfied that the prosecution had successfully established a *prima facie* case, the accused was called to enter his defence for the main charge. In his defence, the accused submitted that (i) the lorry belonged to the company; (ii) he did not sign exh. P7; (iii) as a crane driver for the company, he did not have the money to purchase the lorry; and (iv) although the premise was his mother's house, he did not live there but did not have his address changed in his identity card. The Magistrate found that the accused failed to raise a doubt on the prosecution's case. The accused was, therefore, convicted and sentenced with a fine of RM30,000, in default 12 months imprisonment. Hence, the present appeals by (i) the accused against his conviction and sentence; and (ii) the prosecution against the sentence. In support of his appeal, the accused argued that (i) the prosecution had not proved the element of control as the accused was not at the scene when the raid took place; (ii) exh. P7 was not a valid contract for the sale of the lorry to the accused because the registration card stated that the lorry belonged to the company; and (iii) the charge against the accused was bad for duplicity as he was charged for two different offences based on the same set of facts.

Held (allowing appeal; acquitting and discharging accused of main and alternative charges):

(1) The only evidence relied upon by the prosecution to prove the ingredient of 'control' for the charge proffered against the accused under s. 21 of the Act was (i) exh. P7, namely the letter purporting to be the evidence for the sale of the lorry by the company to the accused; and (ii) the search result of the NRD ('exh. P72') which showed that the address of the accused was at the premise and the said premise belonged to the family of the accused where his mother lived. As far as the record of the RTD was concerned, the lorry was still registered to the company. In light of the ownership record of the RTD in respect of the lorry and

the contents of exh. P7, there was insufficient evidence adduced by the prosecution to show that the lorry belonged to the accused to drive home the ingredient of control by the accused of the diesel in question. (paras 28, 29 & 31)

(2) There was no evidence led by the prosecution to show that the key to the lorry was obtained from the accused to suggest that the accused had control or at least access to the lorry. There was also no explanation offered by the prosecution about the key to the lorry. According to PW7, the lorry was surrendered to her by the raiding team without any keys. This further negated the element of control by the accused. (para 33)

(3) Exhibit P72 was not sufficient to prove that the accused was residing at the premise at the time of the commission of the offence. The record only showed that the accused had an address at the premise. There was no evidence to show that the accused stayed at the premise. The open area where the lorry was found belonged to multiple owners but PW7 did not note down the name of the owners despite having made a search at the land office and finding out as such. (para 34)

(4) It was imperative that in finding a *prima facie* case, each and every ingredient of the offence has been established by evidence led by the prosecution. Anything short of it will not suffice. The prosecution failed to prove a *prima facie* case against the accused as the ingredients of the offence have not been proven. The accused should not have been called upon to enter his defence on the main charge. The appeal against the conviction was allowed and the conviction and sentence were set aside. The accused was acquitted and discharged of the main charge. (paras 27 & 39)

(5) The accused was also charged with an alternative charge. However, the Magistrate called for the defence on the main charge but did not make any ruling on the alternative charge. Pursuant to s. 173(f) of the Criminal Procedure Code ('CPC'), it is mandatory for the court to make a finding at the end of the prosecution's case whether a *prima facie* case has been made out against the accused. The Magistrate did not call upon the accused to enter defence in respect of the alternative charge. The prosecution failed to establish a *prima facie* case against the accused in respect of the alternative charge. In the circumstances, the accused was acquitted and discharged of the alternative charge. (paras 40 & 41)

(6) In respect of the subject matter of the offence, since PW3 and PW6 claimed that it was sold to the accused and the accused denied being the owner of the controlled article, disposal of the controlled article and other vehicles shall, after expiry of the time limited to appeal, be disposed of subject to any claim which may be made under s. 414 of the CPC. (para 42)

Case(s) referred to:
Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Jagar Singh v. PP [1936] 1 LNS 25 HC ***(refd)***
Lamat Burut v. PP [1992] 1 LNS 43 CA ***(refd)***
Leong Poh Chin v. Chin Thin Sin [1959] 1 LNS 50 HC ***(refd)***
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC ***(refd)***
Mohd Yusri Mangsor & Anor v. PP [2014] 7 CLJ 897 CA ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
Pathmanabhan Nalliannen v. PP & Other Appeals [2017] 4 CLJ 137 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Jamali Adnan [1985] 1 CLJ 196; [1985] CLJ (Rep) 656 HC ***(refd)***
PP v. Ling Tee Huah [1980] 1 LNS 212 ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Ravindran Ramasamy v. PP [2015] 3 CLJ 421 FC ***(refd)***
Theresa Toyat & Anor v. KHL Sdn Bhd [2015] 7 CLJ 1051 CA ***(refd)***
Toh Ah Loh & Mak Thim v. Rex [1948] 1 LNS 72 HC ***(refd)***

Legislation referred to:
Control of Supplies Act 1961, ss. 20(1), 21, 22(1), (2), 25
Criminal Procedure Code, ss. 173(f), 414
Evidence Act 1950, ss. 91, 92

For the appellant - Mohd Ismail Mohamed; M/s Ismail, Khoo & Assocs
For the respondent - Afiq Anwar Mohamed Sapian; DPP

Reported by Najib Tamby

JUDGMENT

Ahmad Shahrir Mohd Salleh JC:

Introduction

[1] At the Magistrate's Court, the accused was charged with two offences under the Control of Supplies Act 1961. One charge is for an offence under s. 21 of the Control of Supplies Act 1961 punishable under s. 22(1) of the same Act for being in possession of a controlled article, namely 2,231L of diesel in lorry No. PCD 4398, in such circumstances as to raise a reasonable suspicion that an offence against the Act is intended to be committed, that is in dealing with the diesel without a licence. The other is an alternative charge for an offence under s. 20(1) of the Control of Supplies Act 1961 punishable under s. 22(2) of the same Act for permitting a controlled article, namely, 2,231L of diesel which was stored in lorry No. PCD 4398 at a premise which is not licensed or approved by the Controller.

[2] At the close of the prosecution, the learned Magistrate made a finding that the prosecution has succeeded in proving a *prima facie* case against the accused and called upon him to enter his defence on the charge under s. 21

of the Control of Supplies Act 1961. At the close of defence, the learned Magistrate found that the accused has failed to raise a doubt in the prosecution's case. The accused was convicted and sentenced with a fine of RM30,000 in default 12 months of imprisonment. The diesel seized was forfeited.

[3] The accused is not satisfied with the decision and appeals against the conviction. The prosecution is not satisfied with the sentence meted out by the learned Magistrate and appeals against sentence. Both the appeal against conviction and sentence are heard together. After analysing the records of appeal and considering the submissions of learned counsel and the learned Deputy Public Prosecutor, I allowed the appeal against conviction. In this judgment, the accused and the prosecution are referred to as they were at the trial court.

Brief Facts

[4] At the Magistrate's Court, the two charges against the accused read as follows:

> Pertuduhan:
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> Bahawa kamu pada 12 November 2013, jam lebih kurang 12:30 petang, di kawasan lapang bersebelahan rumah No. 2013, Kampung Pengkalan, Batu Kawan, di dalam Daerah Simpang Ampat, di dalam Negeri Pulau Pinang, telah ada dalam kawalan kamu barang kawalan yang juga merupakan barang berjadual iaitu minyak diesel sebanyak 2,231 liter di dalam lori nombor pendaftaran PCD 4398, dalam keadaan yang boleh menimbulkan syak yang munasabah untuk melakukan kesalahan di bawah Peraturan 3(1) Peraturan-Peraturan Kawalan Bekalan 1974, iaitu berurusan dengan diesel tersebut secara runcit atau borong tanpa lesen dan oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 21 Akta Kawalan Bekalan 1961 yang boleh dihukum di bawah seksyen 22(1) Akta yang sama.

Pertuduhan pilihan:

> Bahawa kamu pada 12 November 2013, jam lebih kurang 12:30 petang, di kawasan lapang bersebelahan rumah No. 2013, Kampung Pengkalan, Batu Kawan, di dalam Daerah Simpang Ampat, di dalam Negeri Pulau Pinang, didapati telah membenarkan barang kawalan yang merupakan barang berjadual iaitu minyak diesel sebanyak 2,231 liter disimpan di premis yang tidak dilesenkan atau diluluskan oleh Pengawal iaitu di dalam tangki tambahan lori nombor pendaftaran PCD 4398. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 20(1) Akta Kawalan Bekalan 1961 yang boleh dihukum di bawah seksyen 22(2) Akta yang sama.

[5] On 12 November 2013 at about 12:30 noon, a raiding team from the Enforcement Division of the Ministry of Trade, Co-operatives and Consumerism led by PW4 carried out a raid at an open area beside premise No. 2013, Kampung Pengkalan, Batu Kawan, Simpang Ampat, Penang.

There were other houses beside the open area. According to PW4, when the raiding team arrived at the scene, there were two vehicles parked close to each other at the open area, namely a tanker bearing registration number MAJ 7267 and a 10-tonne lorry bearing registration number PCD 4398. Two other tankers were parked close to each other at another spot at the same place, namely one bearing registration number PDQ 1897 and the other bearing registration number DAE 4799.

[6] PW4 and his team made an observation but found that no one came near the vehicles. PW4 and his team then made a move towards tanker No. MAJ 7267 and the 10-tonne lorry No. PCD 4398. Upon inspection, PW4 found that the tanker No. MAJ 7267 was not locked and the 10-tonne lorry No. PCD 4398 was locked. PW4 found both vehicles to contain liquid suspected to be diesel in their respective tanks. The liquid suspected to be diesel in tanker No. MAJ 7267 was found in four compartments of its tank while in the 10-tonne lorry No. PCD 4398, the liquid suspected to be diesel was found in an additional tank at its rear which was covered with canvas. PW4 also found diesel in the tankers No. PDQ 1897 and No. DAE 4799, respectively. PW4 was later instructed to inspect a Pajero bearing registration number PDN 1540 which was parked in front of house No. 2013 at the same area. Upon inspection, PW4 found that under the rear seat, there is a modified tank. There was no evidence led as to whether there was any liquid suspected to be diesel too in this tank.

[7] All the vehicles were impounded and samples of the liquid suspected to be diesel were taken and sent for analysis. The chemist (PW5) later confirmed that the liquid he analysed is diesel. According to PW4 in his report (exh. P63), the quantity of diesel that was seized from the 10-tonne lorry No. PCD 4398 amounted to 2,231L based on exh. P15 which was confirmed by the purchaser appointed by the Ministry of Trade, Co-operatives and Consumerism for the purchase of the seized diesel.

[8] The accused was not at the scene when the raid took place. According to the investigating officer (PW7), she carried out a search at the Road Transport Department to determine the ownership of the 10-tonne lorry No. PCD 4398. The Road Transport Department search (exh. P69) shows that the 10-tonne lorry No. PCD 4398 belongs to Sin Eng Aun Mobile Crane Sdn Bhd.

[9] PW7 then made a further search at the Companies Commission of Malaysia in respect of Sin Eng Aun Mobile Crane Sdn Bhd and the official search results from the Companies Commission of Malaysia (exh. P6) shows that there are two directors for Sin Eng Aun Mobile Crane Sdn Bhd, namely Tan Seng Ee (PW3) and Tan Heng Seng (PW6). Both of them are related to the accused. From her investigation, PW7 found that the 10-tonne lorry No. PCD 4398 has been sold to the accused for RM20,000 cash based on "Surat Perjanjian Antara Penjual dan Pembeli" dated 1 May 2013 between Sin Eng Aun Mobile Crane Sdn Bhd and the accused (exh. P7).

[10] PW7 made an address search at Tenaga Nasional Berhad and found that premise No. 2013 which was situated near the open area where the 10-tonne lorry No. PCD 4398 containing the offending diesel was found belongs to one Lee Paik Joo. PW7 then obtained a family tree for Lee Paik Joo from the National Registration Department and found that Lee Paik Joo is the accused's mother. PW7 also found out from the National Registration Department that the accused's address is at the same premise No. 2013.

[11] The learned Magistrate made a finding that the prosecution had proved a *prima facie* case against the accused for the charge under s. 21 of the Control of Supplies Act 1961 and called upon the accused to enter his defence. The accused in his defence elected to give evidence under oath.

[12] In his defence, the accused said that the 10-tonne lorry No. PCD 4398, in which the offending diesel was found in the additional tank at its rear, belonged to Sin Eng Aun Mobile Crane Sdn Bhd.

The accused did not sign any document of transfer for the lorry. The accused only worked as a crane driver for the company. Although exh. P7 carries his name as the purchaser of the lorry, the accused does not know what are the contents of exh. P7. He was asked by PW3 and PW6 to sign exh. P7 after being informed by them that it was a bond for the release of the lorry. The accused do not have the money to pay for the RM20,000 in cash allegedly as the purchase price for the lorry as stated in exh. P7 as he was only a crane driver. The accused has no knowledge of the RM150 payment for permit rentals.

[13] The accused agrees that premise No. 2013 is his mother's house but denies that he stayed at the house when the raid was carried out. According to the accused, he had moved out from the house in 1995 after he got married and stayed at Batu Kawan but did not have his address changed on his identity card. At the material time, the accused maintained that he was at his house and that he did not drive the lorry.

Deliberations

The Defence Contentions

[14] Learned counsel for the defence argues that the prosecution had not proved the element of control against the accused of the diesel in question. The accused was not at the scene when the raid took place. The only evidence led by the prosecution to prove the ingredient of control against the accused to support the charge under s. 21 of the Control of Supplies Act 1961 is based on exh. P7 and assumption that the accused stayed at the house near the open area where the lorry was found, namely at premise No. 2013. Learned counsel for the defence refers to the cases of *Leow Nghee Lim v. Regina* [1955] 1 LNS 53; [1956] 22 MLJ 28, *Toh Ah Loh & Mak Thim v. Rex* [1948] 1 LNS 72; [1949] 15 MLJ 54 and *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] 22 MLJ 237.

[15] It was also argued that exh. P7 is not a valid contract for the sale of the lorry to the accused because the registration card states that the lorry belonged to Sin Eng Aun Mobile Crane Sdn Bhd. In finding that the accused had control of the offending diesel, the learned Magistrate had relied on the evidence of PW3 and PW6 and exh. P7 which purportedly shows that the lorry was sold to the accused for RM20,000 cash. Both PW3 and PW6 are the directors of Sin Eng Aun Mobile Crane Sdn Bhd and obviously have an interest to protect in this case. Learned counsel for the accused refers to the cases of *Theresa Toyat & Anor v. KHL Sdn Bhd* [2015] 7 CLJ 1051 and *Leong Poh Chin v. Chin Thin Sin* [1959] 1 LNS 50; [1959] 25 MLJ 246.

[16] It was also argued that the charge against the accused was bad for duplicity. The accused was charged for two different offences based on the same set of facts. One charge under s. 21 of the Control of Supplies Act 1961 and another alternative charge under s. 20(1) of the same Act. Learned counsel for the defence contends that the learned Magistrate had failed to address this issue in his grounds of judgment. Learned counsel for the defence refers to the cases of *Jagar Singh v. PP* [1936] 1 LNS 25; [1936] MLJ 92 and *Ravindran Ramasamy v. PP* [2015] 3 CLJ 421.

The Prosecution's Contentions

[17] The learned Deputy Public Prosecutor contends that the prosecution has succeeded in proving all the ingredients of the charge against the accused and that the defence is an afterthought. The learned Deputy Public Prosecutor contends that in a charge under s. 21 of the Control of Supplies Act 1961, the ingredients of the offence which must be proved by the prosecution are (1) that the diesel seized is a controlled item; (2) that the accused has control over the diesel; (3) there is reasonable suspicion that the accused deals with the diesel; and (4) that the accused has no licence or approval to deal with or store the diesel. The position of the law at the end of the case for the prosecution as reiterated in the case of *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800; [2009] 2 MLJ 613 FC was quoted in support of the prosecution's submissions.

[18] The prosecution contends that the learned Magistrate had rightly made a finding that the accused had control of the diesel in question. The prosecution submits that at the material time, the accused had control of the diesel in question and the main evidence to prove the element of control are that (1) the lorry No. PCD 4398 was found at the open area right in front of the house belonging to the accused's family; (2) the lorry No. PCD 4398 belonged to the accused based on exh. P7 and the evidence of PW3 and PW6; and (3) the diesel was found in an additional tank at the rear of the lorry No. PCD 4398 and covered with canvas. The prosecution relies on the decision of the Court of Appeal of Bandar Seri Begawan, Brunei in case of

Lamat Burut v. PP [1992] 1 LNS 43; [1993] 2 MLJ 273 where the court in that case referred to *PP v. Jamali Adnan* [1985] 1 CLJ 196; [1985] CLJ (Rep) 656; [1985] 2 MLJ 392 which observed that:

> For myself I would hold that mere knowledge of the whereabouts of offensive material cannot be equated to control. The mere fact that A knows where B has concealed firearms is not enough. There has to be something more. That something to my mind is an element of domination over the material. It must be shown at the very least therefore that the situation where the material is placed is such that the person who had knowledge of its whereabouts had also access of it and could at any opportune moment of his choice have obtained possession of it or the capacity to direct its disposal.
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> This means that control includes an ability to possess, though a person may not be in control if someone else is in possession.

[19] The learned Deputy Public Prosecutor further refers to the cases of *Parlan Dadeh v. PP* [2009] 1 CLJ 717 FC and *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 FC and submits that the accused had not attempted to explain or provide any explanation in respect of control of the diesel in question. The prosecution submits that the failure of the accused to give a reasonable explanation gave rise to the inference that the accused in fact had knowledge of the diesel.

[20] The learned Deputy Public Prosecutor submits that exh. P7 which shows that the lorry PCD 4398 had been sold to the accused must be accepted and that the accused could not give evidence to the contrary based on the parol evidence rule. The accused had not called any witnesses or adduce any evidence to show that exh. P7 is not valid. The learned Deputy Public Prosecutor also submits that there is no duplicity of charges because both charges are proffered against the accused under different provisions of the Act. The main charge is under s. 21 while the alternative charge is under s. 20(1) of the Act. The charges will amount to a duplicity if both charges are proffered simultaneously against the accused as a first and second charge. In the present appeal, the accused was called upon to enter his defence and convicted only of the main charge.

[21] The learned Deputy Public Prosecutor also submits s. 25 of the Control of Supplies Act 1961 is applicable and the prosecution only has a duty to prove that the accused committed the act as charged and the burden then shifts on the accused to show that he is entitled to do the act.

[22] The learned Deputy Public Prosecutor submits that the accused's defence is a bare denial and an afterthought. The accused did not provide any evidence to support his defence. The learned Deputy Public Prosecutor relies on the case of *PP v. Ling Tee Huah* [1980] 1 LNS 212; [1982] 2 MLJ 324 where the court made a remark that:

> A mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient.

[23] Other submissions relate to the identity of the diesel and sufficiency of the investigation which in my opinion do not give rise to issues raised by the accused in the appeal although canvassed in his petition of appeal.

Analysis And Decision

[24] In considering the appeal, the duty of this court is to consider it aligned with the observations made by the Court of Appeal in *Mohd Yusri Mangsor & Anor v. PP* [2014] 7 CLJ 897 CA in the following terms:

> It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:
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> (a) the judgment is based upon a wrong premise of fact or of law;
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> (b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;
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> (c) the trial judge has completely overlooked the inherent probabilities of the case;
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> (d) that the course of events affirmed by the trial judge could not have occurred;
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> (e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or
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> (f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned,
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> then an appellate court will intervene to rectify that error so that injustice is not occasioned (See *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 4 MLJ 149, (CA); *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545 (CA); [1995] 3 MLJ 395 (CA)).

[25] In *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, the Federal Court recapitulate the duty of a trial court at the end of the case for the prosecution as follows:

> After the amendments to ss. 173(f) and 180 of the CPC, the statutory test has been altered. What is required of a Subordinate Court and the High Court under the amended sections is to call for the defence when it is satisfied that a *prima facie* case has been made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the

inference that is favourable to the accused. See, *Tai Chai Keh v. Public Prosecutor* [1948] 1 LNS 122; [1948-49] MLJ Supp 105; *Public Prosecutor v. Kasmin bin Soeb* [1974] 1 LNS 116; [1974] 1 MLJ 230. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a *prima facie* case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a *prima facie* case has been made out, it must call for the defence. If the accused then elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond a reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the *prima facie* case one that is established beyond a reasonable doubt. Put shortly, what the trial court is obliged to do under ss. 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See, *Dato' Mokhtar bin Hashim & Anor v. Public Prosecutor* [1983] 2 CLJ 10; [1983] CLJ 101 (Rep); [1983] 2 MLJ 232. If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.

[26] The meaning of the term *prima facie* case was explained in the case of *Balachandran v. PP* [2005] 1 CLJ 85 FC whereby His Lordship the late Augustine Paul JCA (later FCJ) in delivering the judgment of the Federal Court observed that:

A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase "*prima facie* case" is defined in similar terms in *Mozley and Whiteley's Law Dictionary*, 11th edn. as:

> A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand, if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

[27] It is therefore imperative that in finding a *prima facie* case, the court must be satisfied that each and every ingredient of the offence has been established by evidence led by the prosecution. Anything short of it will not suffice.

[28] I have evaluated the record of appeal and considered the submissions of learned counsel and the learned Deputy Public Prosecutor. The only evidence relied upon by the prosecution to prove the ingredient of "control" for the charge proffered against the accused under s. 21 of the Control of Supplies Act 1961, *to wit*, of the 2,231L of diesel, are firstly, exh. P7, namely the letter purporting to be the evidence for the sale of lorry No. PCD 4398 by Sin Eng Aun Mobile Crane Sdn Bhd to the accused and secondly, the search result of the National Registration Department, exh. P72, which showed that the accused's address is at premise No. 2013, Kampung Pengkalan, Batu Kawan, Simpang Ampat, Pulau Pinang and that premise No. 2013 belonged to the accused's family whereby the accused mother lived there.

[29] It is not in dispute that as far as the record of the Road Transport Department is concerned, the lorry No. PCD 4398 is still registered to Sin Eng Aun Mobile Crane Sdn Bhd. The prosecution sought to prove, by exh. P7, that the lorry No. PCD 4398 has been sold to the accused on 1 May 2013 for RM20,000 in cash.

[30] PW3 and PW6 as the directors for Sin Eng Aun Mobile Crane Sdn Bhd who is the registered owner of the lorry PCD 4398, gave evidence that lorry No. PCD 4398 in which the controlled article was found has been sold to the accused and exh. P7 evidenced that sale. However, in cross-examination, PW3 admits that he does not know the contents of exh. P7 which he signed because he cannot read. PW6 too in cross-examination admits that he did not understand the contents of exh. P7 which he signed.

[31] I am of the considered view, in light of the ownership record of the Road Transport Department in respect of the lorry No. PCD 4398 and the contents of exh. P7, that there is insufficient evidence adduced by the prosecution to show that the lorry No. PCD 4398 in fact do belong to the accused to drive home the ingredient of control by the accused of the diesel in question. In light of the admission by both PW3 and PW6 that they do not understand the contents of exh. P7, I would attach very little weight to exh. P7 as evidence to prove the sale of lorry No. PCD 4398 to the accused.

[32] I am also of the considered view that parole evidence rule in respect of exh. P7 is not a relevant consideration. Before parole evidence rule may be invoked by the prosecution to exclude the explanation by the accused as to the ownership of the lorry No. PCD 4398, it must first be established that exh. P7 comes within the ambit of ss. 91 and 92 of the Evidence Act 1950. This has not been done by the prosecution and I am of the considered view that based on the evidence, the parole evidence rule could not be invoked as such.

[33] There was no evidence led by the prosecution to show that the key to the lorry PCD 4398 was obtained from the accused to suggest that the accused had control or at least access to the lorry. There was also no explanation offered by the prosecution about the key to the lorry PCD 4398. According to the investigating officer (PW7), the lorry No. PCD 4398 was surrendered to her by the raiding team without any keys. This in my considered view, further adds to negative the element of control by the accused.

[34] I also find that exh. P72 is not sufficient to prove that the accused was residing at premise No. 2013 at the time of the commission of the offence. The record only shows that the accused has an address at premise No. 2013. There was no evidence to show that the accused in fact still stays at the premise. The open area where the lorry No. PCD 4398 containing the diesel in question was found belongs to multiple owners but the investigating officer (PW7) did not note down the name of the owners despite having made a search at the Jawi Land Office and finding out as such.

[35] In dealing with circumstantial evidence, the Federal Court in *Pathmanabhan Nalliannen v. PP & Other Appeals* [2017] 4 CLJ 137 FC made the following observations:

> [173] The law is well settled on the standard of proof required in criminal cases where the evidence presented before the court to prove the commission of the offence by the accused person is circumstantial in nature.
>
> [174] In *Chan Chwen Kong v. PP* [1962] 1 LNS 22; [1962] 28 MLJ 307, Thomson CJ, said that "... where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope.
>
> [175] In *Ahmad Najib Aris v. PP* [2007] 2 CLJ 229, Abdul Aziz Mohamad JCA (as he then was), delivering the judgment of the Court of Appeal said:
>
> > ... As to what circumstantial evidence is, it is needful to quote only that part of the summing up to the jury that is set out in *Idris v. Public Prosecutor* [1960] 1 LNS 40; [1960] 26 MLJ 296 at p 297:
> >
> > > With regard to the definition of circumstantial evidence I can give you no better definition than quote to you the words of Lord Cairns in the case of *Belhaven & Stenton Peerage* reported in 1875 - 6 Appeal Cases, page 279:
> > >
> > > > My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may

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> have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.

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> In other words, circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all ... .

C

[36] I am of the considered view that the two circumstantial evidence relied upon by the prosecution to prove that the accused had control of the controlled article do not irresistibly point to the guilt of the accused. The burden of proof lies on the prosecution to prove its case and at the end of the prosecution's case, there is no burden cast upon the accused.

D

[37] In finding that the accused has knowledge of the 2,231L of diesel in lorry No. PCD 4398, I am of the considered view that there was misdirection committed by the learned Magistrate at p. 25 of the record of appeal (vol. 1) when she made a finding that it would be unreasonable if the accused were to say that he has no knowledge because of the "overwhelming" evidence. The learned Magistrate said:

E

> Malahan adalah sesuatu yang tidak munasabah sekiranya OKT menyatakan beliau tiada pengetahuan dan menafikan pemilikan ke atas diesel tersebut kerana kesemua bukti dan keterangan menjurus terhadap pemilikan beliau ke atas diesel berkenaan.

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[38] I am of the considered view that based on the facts and the evidence adduced by the prosecution, the finding of the learned Magistrate of the "overwhelming" evidence is not at all supported.

Pronouncement

G

[39] I am satisfied that the prosecution has failed to prove a *prima facie* case against the accused as the ingredients of the offence have not been proven. The accused should not have been called upon to enter his defence on the main charge. The appeal against conviction is allowed and the conviction and sentence are set aside. The accused is hereby acquitted and discharged of the

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main charge.

[40] The accused was also charged with an alternative charge under s. 20(1) of the same Act. The learned Magistrate called for defence on the main charge but did not make any ruling on the alternative charge. Pursuant to s. 173(f) of the Criminal Procedure Code, it is mandatory for the court to

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make a finding at the end of the prosecution's case whether a *prima facie* case has been made out against the accused.

[41] Based on the evidence adduced by the prosecution, the learned Magistrate did not call upon the accused to enter defence in respect of the alternative charge. I am of the view that the prosecution too has failed to establish a *prima facie* case against the accused in respect of the alternative charge. In the circumstances, I acquit and discharge the accused of the alternative charge as well.

[42] In respect of the subject matter of the offence, since PW3 and PW6 claim that it has been sold to the accused and the accused denies being the owner of the controlled article, disposal of the controlled article and other vehicles shall, after expiry of the time limited to appeal, be disposed of subject to any claim which may be made under s. 414 of the CPC.